FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 29 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 262

DEAN OIL COMPANY,

Petitioner,

vs.

AMERICAN OIL COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. BUTLER
Suite 2900 Prudential Plaza
Chicago 1, Illinois,

FRED G. STICKEL, JR.
Raymond-Commerce Building
Raymond Boulevard
Newark 2, New Jersey
Attorneys for Respondent, The American Oil Company.

RODNEY M. NASH,
ROBERT D. MITCHELL,
Of Counsel.

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
The Questions Presented	2
Constitutional Provision and Statutes Involved	4
Preliminary Statement	4
Statement of the Case	5
Argument	7
A. Petitioner Has Not Been Deprived Of Due Process Contrary To The Fifth Amendment	7
B. The Courts Below, Pursuant To The Rules Of Decision Act, Acted Correctly In Accepting The Construction Given By *Addiss* To The New Jersey Two-Year-Statute Of Limitation	10
Conclusion	12
Appendix to Petition	1a
Constitutional Provision	1a
Rules Of Decision Act	1a
New Jersey Statutes	1a, 2a

CITATIONS

PAGE

Cases

Addiss v. Logan Corporation, 23 N.J. 142, 128 A. 2d 462 (1957) 2, 4, 8, 10, 11

Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956), affirmed, 352 U.S. 863 (1956) 9

Bauserman v. Blunt, 147 U.S. 647 (1893) 7

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 9

Buckeye Powder Co. v. Du Pont Powder Co., 248 U.S. 55 (1918) 9

Campbell v. Haverhill, 155 U.S. 610 (1895) 7

Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906) 7

Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955) 11

Cope v. Anderson, 331 U.S. 461 (1947) 7

Cruickshanks v. Eak, 33 N.J. Super. 285, 110 A. 2d 61 (Law Div. 1954) 11

Florida Wholesale Drug v. Ronson Art Metal Works, 110 F. Supp. 573 (D. N.J. 1953) 4

Gordon v. Loew's Incorporated, 247 F. 2d 451 (3rd Cir. 1957) 6, 11

H. J. Jaeger Research Laboratories v. Radio Corporation, 90 F. 2d 826 (3rd Cir. 1937) 4

PAGE

Karseal Corporation v. Richfield Oil Corporation, 221 F. 2d 358 (9th Cir. 1955) 11

Knights of Pythias v. Meyer, 265 U.S. 30 (1924) 7

McLaren v. McVicar, 41 N.J.L. 271 (1879) 11

Moore v. Illinois Central Railroad Co., 312 U.S. 630 (1941) 7

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20 (1916) 9

Patterson v. Colorado, 205 U.S. 454 (1907) 9

Shelton Electric Co. v. Victor Talking Machine Co., 277 Fed. 433 (D.N.J. 1922) 4

Sioux County v. National Surety Co., 276 U.S. 238 (1928) 8

Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937) 8

Vandenbark v. Owens-Illinois Co., 311 U.S. 538 (1941) 8

West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940) 8, 12

Constitutional Provision and Statutes

Fifth Amendment to Constitution of the United States 3, 4

28 U.S.C. § 1652 ..... 2, 3, 4, 7, 10

N.J.S. 2A: 14-1 ..... 2, 4

N.J.S. 2A: 14-10 ..... 2, 4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 262

DEAN OIL COMPANY,

Petitioner,

vs.

AMERICAN OIL COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the Court of Appeals is reported in 254 F. 2d 816, and is set forth in the appendix to the petition. It affirmed the judgment (App. R. 32a) of the District Court of November 1, 1957.

Jurisdiction

The judgment of the Court of Appeals was entered on May 20, 1958. Petitioner filed its petition for writ of certiorari on August 7, 1958, invoking jurisdiction of this Court under 28 U.S.C. § 1254 (1).

The Questions Presented

The review here sought by petitioner involves, in essence, the interpretation of a local limitation law by a state court which the courts below, following the then applicable Rules of Decision Act (§ 34 of the Federal Judiciary Act of September 24, 1879, 1 Stat. 92; now 28 U.S.C. § 1652), accepted and applied to petitioner's treble damage price discrimination complaint brought under Section 4 of the Clayton Act.

During the pendency in the District Court of this case, which was admittedly governed by the statutes of limitation of the State of New Jersey, the Supreme Court of that state, in *Addiss* v. *Logan Corporation*, 23 N.J. 142, 128 A. 2d 462 (1957), held the New Jersey two-year statute of limitation, N.J.S. 2A: 14-10, to be applicable to an action for treble damages by an overcharged tenant under that state's rent control law. Because of the essentially similar nature of that case to actions under Section 4 of the Clayton Act, the courts below accepted this construction of the New Jersey two-year statute and applied it in bar of petitioner's claim. Petitioner had assumed, from its reading of earlier federal decisions, that the New Jersey limitation period applicable in its instance was six years, the time prescribed by N.J.S. 2A: 14-1.

The questions presented by this petition therefore do not arise from a decision in conflict with the decision of another court of appeals or with any decision of this Court, but

rather concern a matter of local law. Indeed, the petition presents a situation the precise parallel of which cannot arise in the future because of the enactment of the federal four-year statute of limitation (69 Stat. 283; 15 U.S.C. § 15B), which became effective on January 7, 1956 as to treble damage antitrust actions filed thereafter. Petitioner's criticism, therefore, is directed to the past and to the fact that the courts below accepted the *Addiss* decision rather than their own contrary predictions which preceded it. Petitioner, moreover, couches its complaint in this Court only in terms of a constitutional attack under the Fifth Amendment; it does not here invoke, as it did in the courts below, the Fourteenth Amendment.

Under the circumstances, respondent respectfully suggests that the two questions posed by the petition properly are these:

1. In a case admittedly governed by the limitation laws of the State of New Jersey, is petitioner deprived of property contrary to the due process clause of the Fifth Amendment to the Constitution of the United States by the action of the courts below in applying to petitioner's case the New Jersey two-year statute of limitations in accordance with the interpretation given to that statute by the highest court of that state, and by rejecting the New Jersey six-year statute of limitations which earlier federal decisions had assumed would apply?

2. Were not the courts below correct in accepting, pursuant to the Rules of Decision Act, the construction given to the New Jersey two-year statute of limitations by the highest judicial tribunal of that State?

Constitutional Provision and Statutes Involved

The constitutional provision invoked by petitioner is the due process clause of the Fifth Amendment to the Constitution of the United States. The pertinent statutes are the Rules of Decision Act (§ 34 of the Federal Judiciary Act of September 24, 1879, 1 Stat. 92; now 28 U.S.C. § 1652), and N.J.S. 2A: 14-1 and 14-10. The text of the provision and of these statutes is set out as an appendix to this brief.

Preliminary Statement

Prior to the decision by the Supreme Court of New Jersey of *Addiss* v. *Logan Corporation*, 23 N.J. 142, 128 A. 2d 462 (1957), which held that state's two-year statute of limitation, N.J.S. 2A: 14-10, to be applicable to a treble damage action by an overcharged tenant of rent-controlled property, the federal courts had assumed, in the then absence of authoritative state judicial interpretation, that the New Jersey six-year statute of limitation provided the period applicable to treble damage actions brought in the District of New Jersey under Section 4 of the Clayton Act.[1] Following the *Addiss* decision, however, the courts

[1] See **H. J. Jaeger Research Laboratories v. Radio Corporation**, 90 F. 2d 826 (3rd Cir. 1937); **Buckeye Powder Co. v. Du Pont Powder Co.**, 248 U.S. 55, 63 (1918); **Shelton Electric Co. v. Victor Talking Machine Co.**, 277 Fed. 433 (D.N.J. 1922); **Florida Wholesale Drug v. Ronson Art Metal Works**, 110 F. Supp. 573 (D.N.J. 1953). Actually in the case first cited, and presumably in the second, the question was as to the applicability of **any** statute of limitation of New Jersey to the treble damage action and not as to **which** statute of that state might be applicable. In the two District Court cases, the two-year statute was thought to be inapplicable, though petitioner should have been forewarned by the comment of the District Judge in the last case, 110 F. Supp. 573 at 575, that "no New Jersey State courts have apparently passed on this question" and hence the court was forced to prophecy as to what might come to pass, "an obviously hazardous occupation."

below accepted the meaning and scope which the Supreme Court of New Jersey had found in the two-year statute, and applied this statute to petitioner's then pending case, which had been brought more than two years after its cause of action had accrued. Petitioner now claims that the courts below cannot constitutionally bar its claim, a position which necessarily assumes that petitioner has some right or property in the earlier federal decisions of which it cannot be deprived.

Statement of the Case

Petitioner, a New Jersey corporation which had purchased gasoline and other commodities from respondent from 1940 through the month of June, 1953, filed suit on January 5, 1956 against respondent in the United States District Court for the District of New Jersey, demanding treble damages under Section 4 of the Clayton Act by reason of respondent's alleged discriminations against it in the sale of gasoline, contrary as petitioner claimed to the provisions of the Robinson-Patman Act amendments to the Clayton Act.

Petitioner, in filing suit two days before the effective date (January 7, 1956) of the then newly enacted federal four year statute of limitations applicable to such actions (69 Stat. 283; 15 U.S.C. § 15 B), selected its filing date with "cognizance of the statute of limitations" (App. R. 30a) and with the purpose in mind of securing for itself a six-year period of limitations which petitioner assumed "the existing law [*i.e.*, of New Jersey] afforded [it] within which to commence its action." (App. R. 30a). No claim was made by petitioner that it at any time was not aware of the existence of its asserted cause of action.

Respondent answered the complaint, denying the claimed discriminations; but, since the complaint itself stated that the alleged discriminations took place from January 6, 1950 to June 30, 1953 (App. R. 6a), when petitioner ceased to buy from respondent, respondent additionally, and concurrently with its answer, pleaded in bar of petitioner's claim the affirmative defense of the two-year statute of limitation of the State of New Jersey, N.J.S. 2A: 14-10. On petitioner's motion, this plea initially was thought insufficient by the District Court in its opinion of December 26, 1956 (App. R. 17a), which preceded by nineteen days the *Addiss* decision (dated January 14, 1957) of the Supreme Court of New Jersey. However, upon the basis of the *Addiss* decision, and upon its acceptance under the Rules of Decision Act by the Court of Appeals for the Third Circuit in the treble damage antitrust case of *Gordon* v. *Loew's Incorporated*, 247 F. 2d 451 (3rd Cir. 1957),[2] the District Court sustained respondent's plea and entered judgment on November 1, 1957 for respondent. (App. R. 32a).

---

[2] The Court of Appeals commented, 247 F. 2d 451 at 455, that the **Addiss** decision "sheds much light upon this question [of the meaning and scope of the New Jersey two-year statute] which was not available to the district court in this and prior cases."

Argument

A. Petitioner Has Not Been Deprived Of Due Process Contrary To The Fifth Amendment.

Petitioner's assertion, that the courts below cannot constitutionally bar its claim, necessarily assumes that petitioner has some right or property in the early federal decisions which had deemed the New Jersey six-year statute of limitation to be applicable to treble damage actions. But this assumption is without merit for the following reasons:

First. All that the courts below have done is to act obediently to the decisions of this Court and to the Rules of Decision Act. It has long been the case, up until the effective date of the federal four-year statute of limitation, that the statutes of limitation of the state in which the District Court was sitting were to be applied to treble damage antitrust litigation.[3] In applying such statutes, the federal courts were enjoined by the Rules of Decision Act to give effect to the interpretations placed upon such statutes by the states' highest courts.[4] Absent such interpretations, federal courts will themselves proceed to construe the statutes, but with the caveat that their decisions, although disposing of the particular case, cannot

---

[3] **Chattanooga Foundry & Pipe Works v. Atlanta**, 203 U.S. 390, 397 (1906). See **Campbell v. Haverhill**, 155 U.S. 610 (1895); **Cope v. Anderson**, 331 U.S. 461 (1947).

[4] **Moore v. Illinois Central Railroad Co.**, 312 U.S. 630, 634 (1941). See **Bauserman v. Blunt**, 147 U.S. 647 (1893); **Knights of Pythias v. Meyer**, 265 U.S. 30 (1924).

settle the issue of the proper construction of the statute,[5] which can only emanate from the state's judiciary to whose determination prior inconsistent federal predictions must yield in subsequent cases[6] or even in the instance of the parties themselves while their case is still *sub judice*.[7] The raison d'etre of petitioner's situation therefore is the action of the Supreme Court of New Jersey in announcing in the *Addiss* case that its two-year statute of limitation is applicable to a treble damage action essentially similar to that of petitioner's. But, if any constitutional criticism may be made of this, it cannot be made under the Fifth Amendment, which is all that petitioner here asserts.

Second. The ephemeral and submissive nature of federal decisions, in the construction of state statutes, hardly squares with the necessary assertion that they constitute an established procedure or rule of property. Petitioner was not entitled to place any reliance upon them, contingent as they were upon the action of the state judiciary. Perhaps a different case would have arisen had they been formulated upon a state decision which *Addiss* had over-

---

[5] **Thompson v. Consolidated Gas Co.**, 300 U.S. 55, 74 (1937):

"We are always reluctant to pass upon a seriously controverted question of the meaning of a state statute, because our decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute. No court of the State has construed the Act."

[6] **West v. American Telephone and Telegraph Co.**, 311 U.S. 223, 237 (1940):

"State law is to be applied . . . however much the state rule may have departed from prior decisions of the federal courts."

[7] **Sioux County v. National Surety Co.**, 276 U.S. 238, 240 (1928); **Vandenbark v. Owens-Illinois Co.**, 311 U.S. 538, 543 (1941).

ruled;[8] but here again, the Fourteenth Amendment, and not the Fifth, would have been involved. *Addiss*, however, overruled no prior decision. Petitioner's case, therefore, is similar to that of the plaintiff in *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U.S. 20 (1916), about whose constitutional claim this Court, through Mr. Justice Holmes, wrote (p. 26):

> "... The answer to the first half of the plaintiff's contention is no less plain. It is that the construction of a statute does not take a party's property without due process of law simply because it takes him by surprise and when it is too late for him to act on the construction and save his rights."

Third. Petitioner's protestation as to the retroactive application of the two-year statute to its case overlooks the circumstance that petitioner had that period of time within which to file its suit, so that petitioner, unlike the plaintiff in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930), did have the opportunity to present its case and be heard in its support. Petitioner could have sued, but did not, upon its cause of action at any time up to June 30, 1955, two years after it had ceased to buy from respondent. Petitioner waited instead, and took the risk that any forthcoming construction by the New Jersey judiciary of the statutes of limitation of that state would not

---

[8] In which event, compare **Patterson v. Colorado**, 205 U.S. 454, 460 (1907):

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. . . . But in general the decision of a court upon a question of law . . . is not an infraction of the Fourteenth Amendment merely because . . . earlier decisions are reversed."

And see **Baumann v. Smrha**, 145 F. Supp. 617, 625 (D. Kan. 1956), **affirmed**, 352 U.S. 863 (1956), and the cases cited at notes 4, 5, 6 and 7.

accord with its own and the intimations of earlier federal cases. But the teaching of the *Brinkerhoff* case denies petitioner the right to transform the risk it took and lost into a denial of due process. Mr. Justice Brandeis, speaking for the Court, meticulously noted in that case, 281 U.S. 673, 682 n. 9:

> "Had there been no previous decision of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own."

The situation can hardly be otherwise, else the law would afford no protection against those who claimed to have misunderstood it.

B. The Courts Below, Pursuant To The Rules Of Decision Act, Acted Correctly In Accepting The Construction Given By Addiss To The New Jersey Two-Year Statute Of Limitation.

The Supreme Court of New Jersey held in *Addiss* v. *Logan Corporation*, 23 N.J. 142, 128 A. 2d 462 (1957), that the two-year statute of limitation of that state was applicable to the treble damage action given to an overcharged tenant by the New Jersey Rent Control Act. The provision for treble damages, the Supreme Court said, was both remedial and penal: The tenant recovers the measure of unlawful rental extracted and since, by statutory direction, the landlord must pay an amount three times the actual loss to the tenant, the law also operates as a sanction against those who would impugn the statutory purpose of stabilizing rentals in emergency areas and thus incidentally wrong the public. Thus, in terms, the Supreme Court of New Jersey held applicable its two-year statute to treble damage actions given to the person injured not only

to compensate him but to serve as a deterrent to those who would transgress the public policy of the legislation.[9]

That this is the precise nature of the treble damage action provided by Section 4 of the Clayton Act is unquestioned, whether the transgression be called a statutory tort or not.[10] Such treble damage recoveries provide a compensation for damages actually incurred as well as an "additional amount extracted as punishment for the same conduct which caused the injury." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). As the Court of Appeals noted in *Gordon* v. *Loew's Incorporated*, 247 F. 2d 451, 456 (3rd Cir. 1957), paraphrasing the *Addiss* opinion, this "operates as a sanction. True it is largely a wrong to the individual but violations of the antitrust laws also impugn the Congressional purpose of freeing interstate commerce from restraints and monopolies and thus incidentally wrong the public."[11] The Court of Appeals

[9] The **Addiss** decision quite obviously distinguished, 128 A. 2d 462, 466, the case of **Cruickshanks v. Eak**, 33 N.J. Super. 285, 110 A. 2d 61 (Law. Div. 1954), on the ground that no public wrong was involved in that case (a lessor's action for waste committed by his tenant), a circumstance noted by the lower court itself, 110 A. 2d 61, 64-65.

[10] Petitioner's argument that its case involved a tortious injury, and that the **Addiss** action was of an anomalous type, places too much emphasis on labels and disregards substance. Compare **McLaren v. McVicar**, 41 N.J.L. 271 (1879), holding that a statutory action against constables for damages and double costs was barred under the predecessor of N.J.S. 2A: 14-10, though the statute provided for such recovery by action of debt.

[11] To the same effect is **Karseal Corporation v. Richfield Oil Corporation**, 221 F. 2d 358, 365 (9th Cir. 1955), where it is said that the treble damage antitrust action "was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute."

therefore correctly regarded the action for treble damages given by Section 4 of the Clayton Act, which was the predicate of petitioner's action here, as essentially similar in its pertinent characteristics to the action for treble damages involved in the *Addiss* case and hence governed by the New Jersey two-year statute of limitation.

Surely the courts below, in reaching this conclusion, should not be said to have acted improperly when they thus complied with their "duty . . . to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts." *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 237 (1940).

Conclusion

Petitioner has consistently asserted that its case is to be governed by the limitation laws of the State of New Jersey. That it was so governed, a circumstance of which petitioner should not now be heard to complain, hardly presents a reason for review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN C. BUTLER
FRED G. STICKEL, JR.
Attorneys for Respondent,
The American Oil Company.

RODNEY M. NASH,
ROBERT D. MITCHELL,
Of Counsel.

Dated: August 29, 1958.

APPENDIX

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rules of Decision Act, 28 U. S. C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

N. J. S. 2A:14-1:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

N. J. S. 2A:14-10:

All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed:

a. Within 2 years next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to the state of New Jersey only;

b. Within 2 years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party aggrieved; * * *